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TORT LIABILITY FOR CONTRACTUAL LIABILITY

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ABSTRACT. *This article addresses the doctrine of remoteness in tort in light of the Supreme Court's landmark decision in* Armstead v Royal & Sun Alliance Insurance Co. Ltd. Armstead *further attenuates an already weak control on tortious liability. In outline, it does so in two ways: first, by establishing that contractual liabilities incurred as a result of tortiously caused property damage comprise non-remote damage provided that those liabilities represent a reasonable pre-estimate of the counterparty's loss; and, secondly, by allocating the burden of proof in respect of remoteness to defendants. This article explores these rules. It contends, in particular, that the first collides with the fundamental principle that the extent of the claimant's loss in tort is irrelevant to the issue of remoteness while the second means that, oddly, the onus of proof in relation to remoteness in tort differs from that in contract.*

KEYWORDS: *tort law*, *negligence*, *remoteness*, *economic loss*, *burden of proof*, *penalty clauses*.

I. INTRODUCTION

When will tort liability arise in respect of contractual liability? If the defendant's conduct concerned was negligent and the only damage that the claimant suffered as a result was the contractual liability itself, the claimant will generally be unable to recover damages in this regard. Any claim in this connection will normally be precluded by the general principle that damages cannot be obtained in tort in respect of negligently caused pure economic loss.[1] What, however, is the position where the defendant's tort caused the claimant to suffer physical damage and the claimant's contractual liability is consequential upon that damage? Since economic loss that is consequential upon actionable physical damage is generally compensable,[2] one would expect the claimant ordinarily to be able to recover damages in respect of that

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[1] See e.g. *Leigh and Sillavan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] A.C. 785 (H.L.).
[2] See e.g. *Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd.* [1973] Q.B. 27 (C.A.).

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liability. In *Armstead v Royal & Sun Alliance Insurance Co. Ltd.*,[3] the Supreme Court confirmed that this is indeed the case subject to "legal principles capable of limiting the recovery of damages in tort".[4] *Armstead*, as it turned out, was all about one of those limiting principles: the doctrine of remoteness.

II. The Decision in *Armstead*

In *Armstead*,[5] the claimant's (Ms Armstead's) car had been damaged by another driver's fault. While her car was being repaired, she hired a replacement vehicle from a company known as Helphire Ltd. Helphire's business model involved hiring cars on credit terms to motorists whose cars Helphire believed had been wrongfully damaged. Helphire was willing to provide replacement vehicles on credit terms in the expectation that it would in due course be able to recoup, via an assignment of the hirer's claim in tort, the cost of the hire from the driver responsible for the damage (or from the driver's insurer). The arrangement normally meant that the hirer would obtain the use of a replacement car for free. But it also meant that the rate at which Helphire let out its vehicles was substantially higher than the market rate due, at least in part, to the additional costs inherent in offering credit terms.

Whilst the claimant was driving Helphire's car, she was unfortunate enough to be involved in a second accident. That further accident had similarly been caused by the negligence of another motorist, Mr. Galewski. The claimant's contract with Helphire catered for the possibility that the hire car would be taken out of commission. Thus, clause 16 of that agreement provided that the claimant would "on demand pay to Helphire an amount equal to the daily rental rate, up to a maximum of 30 days in respect of damages for loss of use for each calendar day when the vehicle is unavailable". Since the hire car was out of commission for 12 days, Helphire made a demand against the claimant under clause 16 at the daily rental rate of £130 for a total of £1,560. The claimant then either paid that sum or at least accepted liability in respect of it (the position is unclear).

Thereafter, the claimant sued Mr. Galewski's insurer[6] for damages in respect of the £1,560 liability. Her claim failed at all three levels below the Supreme Court.[7] It was rejected for a variety of reasons, including at

[3] [2024] UKSC 6, [2025] A.C. 406.

[4] Ibid., at [53] (Lord Leggatt and Lord Burrows).

[5] The decision is noted in C. Anderson, "Liability to a Hirer for Damage to Property" (2024) 28 Edinburgh Law Review 407; A. Georgiou, "Property Damage, Remoteness and Consequential Contractual Liabilities" [2024] L.M.C.L.Q. 387; A. Waghorn, "Remoteness in the Supreme Court" (2024) 140 L.Q.R. 502; J. O'Sullivan, "Negligent Damage to Bailed Property and Foreseeable Financial Loss" [2024] C.L.J. 218; A. Tettenborn, "Damage to Leased Property: The Supreme Court Restores Orthodoxy" (2024) 4 Journal of Professional Negligence 169.

[6] Under the European Communities (Rights against Insurers) Regulations 2002, SI 2002/3061, reg. 3(2).

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first instance on the basis that, since the claimant did not own the hire car, her claim was in respect of irrecoverable pure economic loss.[8] On the claimant's appeal to the Supreme Court, Lord Leggatt and Lord Burrows, who delivered a judgment with which the rest of the Court agreed, emphatically observed that the case was not one of pure economic loss. That is because loss is not purely economic if it results from damage to property that is owned by the claimant *or to which the claimant has a right to possession*.[9] As Lord Leggatt and Lord Burrows pithily put it, "[t]he loss in this case is not pure economic loss because it is common ground that [the claimant] had a possessory title to the hire car".[10] *Armstead* is clearly correct in this regard as a matter of authority.[11] It is also sound as a matter of policy in circumstances where the familiar objections to the recovery of damages for negligently caused pure economic loss are inapplicable given that a determinate class of persons will have possessory title to the property in issue.

Lord Leggatt and Lord Burrows considered that the only relevant issue in the case was that of remoteness.[12] Their starting point was that "[t]here is no reason in principle why recoverable loss should not include a contractual liability to a third party provided that the liability is consequential on physical damage to the claimant's property".[13] Thus, they said that just as it was reasonably foreseeable that the hire car might be damaged if the insured was negligent, "so [too] is the contractual liability of the claimant to pay damages for loss of use of the hire car".[14] However, and crucially, Lord Leggatt and Lord Burrows added (and the claimant had conceded) that, in order "to fall within this reasonably foreseeable type of loss, it is necessary for the claimant's contractual liability … to constitute a reasonable pre-estimate of the hire company's loss of use".[15] They also said that "a contractual liability … is only reasonably foreseeable if it really is a contractual liability … as opposed to an unfair term for the purposes of Part 2 of the Consumer Rights Act 2015

[7] See e.g. *Armstead v Royal and Sun Alliance Insurance Co. Ltd.*, unreported, Walsall County Court, 1 July 2019; *Armstead v Royal & Sun Alliance Insurance Co. Ltd.* [2022] Lloyd's Rep. I.R. 574 (Walsall C.C.); *Armstead v Royal & Sun Alliance Insurance Co. Ltd.* [2022] EWCA Civ 497, [2023] 1 All E.R. 990. The Court of Appeal's decision is noted in A. Tettenborn, "Damage to Hired Property: Recovery for Loss of Use and Extra Hire Charges" (2023) 2 Journal of Professional Negligence 91.

[8] *Armstead v Royal & Sun Alliance Insurance* [2022] Lloyd's Rep. I.R. 574, at [39].

[9] "[I]n order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it": *The Aliakmon* [1986] A.C. 785, 809 (H.L.) (Lord Brandon).

[10] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [27].

[11] See note 9 above. Cf. the position under Scots law: see Anderson, "Liability to a Hirer", 409–10.

[12] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [44]–[45].

[13] Ibid., at [31]. Although Lord Leggatt and Lord Burrows referred to "property" damage, the principle that they articulated clearly extends to physical damage more generally.

[14] Ibid., at [47(ii)].

[15] Ibid., at [47(iii)].

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or a penalty . . .".[16] This restriction on the recoverability of damages was said to be justified by the rationale for the remoteness bar, which was identified as being "to ensure that an excessive burden of liability does not fall on the defendant".[17]

In view of the foregoing, the Supreme Court needed to decide whether clause 16 constituted a reasonable pre-estimate of Helphire's loss of use.[18] However, because Mr. Galewski's insurer had neither pleaded that the payment of the clause 16 sum was likely to result in Helphire being overcompensated nor adduced any evidence to this effect, the whole issue hinged on the identity of the party who bore the onus of proof regarding the issue of remoteness. Lord Leggatt and Lord Burrows considered that there was a dearth of authority in this connection.[19] However, they held that the defendant carried the burden.[20] They characterised the law of remoteness as belonging to the same family of rules as the doctrines of intervening causation, mitigation of damage, and contributory negligence and reasoned that, since the onus of proving that those latter remedy-limiting rules apply rests with the defendant,[21] coherence required that the same position should obtain as regards the law of remoteness. Lord Leggatt and Lord Burrows also considered that pleading practice reinforced their conclusion. They said that defendants rather than claimants raise the issue of remoteness in their statements of case, and that this "pleading practice is an accurate indication that the defendant bears the burden of proof".[22] The Court's conclusion that the insurer bore the onus of proving that clause 16 was not a reasonable pre-estimate of Helphire's loss of use was, in view of the evidential void, fatal to its case. The claimant was thus entitled to damages in respect of the sum due under clause 16. The ultimate effect of the decision was to transfer one of the costs of customers of companies such as Helphire to third-party insurers.

III. The Substantive Issue

What is to be made of the decision in *Armstead*? It is convenient to start by addressing the Supreme Court's holding regarding the circumstances in

[16] Ibid., at [52].
[17] Ibid., at [47(iv)].
[18] It is puzzling that the Supreme Court fixated on whether the clause 16 sum represented a reasonable pre-estimate of *Helphire's* loss of use. In principle, attention should have instead been on the *claimant's* loss and whether it was of a kind that was reasonably foreseeable. Although the two losses might be regarded as different sides of the same coin on the facts, the doctrine of remoteness, properly understood, is concerned with the claimant's position.
[19] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [58].
[20] Ibid., at [59].
[21] The Supreme Court acknowledged that the position in this regard was unclear concerning legal causation, but considered that "the weight of authority supports the view that here too the burden is on the defendant": ibid., at [61].
[22] Ibid., at [64].

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which tort liability for contractual liability will be imposed. We offer four principal points in this connection. First, a potential objection to the Supreme Court's conclusion that the reasonable person in Mr. Galewski's position would have foreseen that a person such as Ms. Armstead might incur contractual liabilities consequential on damage to the car that she was driving is that it assumes that the reasonable person is unusually perspicacious.[23] As against the foregoing, it might be replied that, since it is obvious that many vehicles are hired[24] or otherwise used in the performance of a contract, the reasonable driver would anticipate that negligence on their part might well cause damage to such vehicles and, in turn, expose persons who own or use them to contractual liabilities. We prefer the latter view, and consider that Lord Leggatt and Lord Burrows were correct on this point, especially in view of the fact that the reasonable person has traditionally been attributed with a significant degree of foresight.

One strongly suspects that the Supreme Court was heavily influenced in deciding this point in the manner that it did because it considered that companies such as Helphire provide a socially valuable service.[25] Lord Leggatt and Lord Burrows cited[26] the decision in *Dimond v Lovell*, which concerned the enforceability of a car hire agreement under the Consumer Credit Act 1974. In that case, Lord Nicholls said that:

> The … services provided by accident car hire companies … redress the imbalance between the individual car owner and the insurance companies. They enable car owners to shift from themselves to the insurance companies a loss which properly belongs to the insurers but which, in practice, owners of cars often have to bear themselves.[27]

This point will have been obvious to the Supreme Court (not least because Lord Burrows had appeared in *Dimond* as counsel).

A second potential difficulty with *Armstead* concerns the fact that Lord Leggatt and Lord Burrows seemed somewhat unsure precisely when a

[23] Georgiou, "Property Damage", 389.

[24] The Department for Transport does not publish statistics on the number of hired vehicles on the roads. However, the British Vehicle Rental and Leasing Association reports that 10.2 million people (i.e. 19 per cent of UK licence holders) rented a car in the UK in 2018: see BVRLA, "Car and Van Rental in the UK: Market and Customer Insight from the BVRLA" (2018), available at https://www.bvrla.co.uk/static/07d762c8-a295-4dc2-9944607000063266f/bvrla-car-and-van-rental-in-the-uk-report-2018.pdf (last accessed 11 April 2025). For context, the Department for Transport reports that there were 38.2 million licenced vehicles in the UK in 2018: see Department for Transport, "Vehicle Licensing Statistics: Annual 2018" (11 April 2019), available at https://assets.publishing.service.gov.uk/media/5cd2e967ed915d788966d2e0/vehicle-licensing-statistics-2018.pdf (last accessed 11 April 2025).

[25] This echoes the Supreme Court's view in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, [2016] A.C. 1172 that ParkingEye had a legitimate interest in protecting its business model by fining motorists who overstayed in its carpark provided that the fines were not extortionate. The model had some social utility since it enabled members of the public to park free of charge in spaces that might, in the absence of enforceable fines, otherwise be clogged up: see at [107], [109], [286].

[26] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [68].

[27] *Dimond v Lovell* [2002] 1 A.C. 384, 391 (H.L.).

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contractual liability will be too remote to be compensable in tort. As we have already observed, they said that the matter hinges on whether the clause concerned is "a reasonable pre-estimate" of the counterparty's loss.[28] But they also considered that the issue was whether the contractual liability really was a contractual liability as opposed to being "unenforceable as a penalty" because it was "out of all proportion to a legitimate interest of the innocent party".[29] The problem here is that, as the Supreme Court's restatement of the law regarding penalties in *Cavendish Square Holding BV v Makdessi*[30] makes clear, these formulae are not synonymous. So, which of them determines when a claim in respect of a contractual liability will fall foul of tort law's remoteness rules? The judgment in *Armstead* is ultimately obscure on this point. Lord Leggatt and Lord Burrows appeared to be willing to countenance this uncertainty on the basis that, "[o]n facts such as these", the difference between the two tests "is very unlikely to produce a different result".[31] But, and with respect, this is unsatisfactory: an appellate court, and *a fortiori* the Supreme Court, is normally not merely determining the dispute before it but laying down rules that apply more broadly.

Relatedly, it might also be asked why the Supreme Court has given its imprimatur to the deployment in the present field of the "reasonable pre-estimate of loss" test given that that is the *Dunlop Tyre* test for whether a clause is penal,[32] which the Supreme Court rejected in *Makdessi*. We suspect that things played out as they did partly due to the Supreme Court's approving in *Armstead*[33] several pre-*Makdessi* cases[34] in which the issue of tort liability for contractual liability had also arisen and in which the *Dunlop Tyre* test for a penalty had understandably been employed. However, part of the explanation also undoubtedly lies in the fact that Ms. Armstead had conceded that she could not recover damages unless the sum claimed satisfied the *Dunlop Tyre* test.[35] Regardless of why things ended up as they have, a curious result now obtains: the *Dunlop Tyre* test, despite its having been superseded by *Makdessi* in the penalty context, now has a second life in the law governing tort liability for contractual liability. In his concurring judgment, Lord Briggs registered some disquiet about this aspect of the joint judgment in circumstances where the Supreme Court had not heard any argument on the point.[36] He was right to do so. Given that the *Dunlop Tyre* test has

[28] See the text accompanying note 15 above.
[29] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [49].
[30] [2015] UKSC 67.
[31] See the remarks in *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [49].
[32] *Dunlop Pneumatic Tyre Co. Ltd. v New Garage and Motor Co. Ltd.* [1915] A.C. 79 (H.L.).
[33] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [37]–[45].
[34] *Ehmler and another v Hall* [1993] 1 E.G.L.R. 137 (C.A.); *Network Rail Infrastructure Ltd. v Conarken Group Ltd.* [2011] EWCA Civ 644, [2012] 1 All E.R. (Comm) 692.
[35] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [46], [76].
[36] Ibid., at [76].

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been rejected in the penalty clause context, it is incoherent for it to be used to determine whether an asserted contractual liability is a genuine liability and is hence recoverable in tort.

A third and, in our view, more serious difficulty with *Armstead* is that the approach that the Supreme Court endorsed cuts across a foundational rule regarding the doctrine of remoteness. It has long been the law that, provided that the *kind* of damage that the claimant suffered was reasonably foreseeable, that damage will be non-remote regardless of whether the *extent* thereof was not. Thus, in *Hughes v Lord Advocate*, Lord Reid said that "[n]o doubt it was not to be expected that the injuries would be as serious as those which the appellant in fact sustained. However, a defender is liable, although the damage may be a good deal greater in extent than was foreseeable".[37] The holding in *Armstead* that damages cannot be recovered in respect of purported contractual liabilities that are so excessive in amount that they are unenforceable is at loggerheads with the principle in *Hughes*. The wholesale inconsistency is brought sharply into focus once it is appreciated that the former is directly concerned with the issue of excessiveness[38] whereas the latter denies its relevance.[39]

Lord Leggatt and Lord Burrows were seemingly alive to (although they did not directly acknowledge or confront) this difficulty with their judgment. Thus, they wrote that only genuine contractual liabilities are a "reasonably foreseeable *type* of loss".[40] They also said that "a purported but invalid contractual liability is not the same *type* of loss … as a valid contractual liability".[41] Clearly, Lord Leggatt and Lord Burrows were striving to avoid any suggestion that the rule that they laid down collided with the principle that the *extent* of the damage suffered is irrelevant to the issue of remoteness. The idea is that a loss flowing from a genuine contractual liability is different in kind from a loss that derives from a purported contractual liability. However, this analysis simply does not work. For one thing, "a purported but invalid contractual liability" is not a "type of loss". Indeed, a person who "incurs" such a liability suffers no loss at all. Furthermore, the test that the Supreme Court has held is to be used to distinguish the two situations turns on, and only on, whether the contractual clause in question imposes a burden that is excessive relative

[37] [1963] A.C. 837, 845 (H.L.).

[38] *Cavendish Square Holding v Makdessi* [2015] UKSC 67, at [244] (Lord Hodge): "Different expressions [a]re used to describe the manifestly excessive nature of the measure in comparison with the interest which the challenged clause protect[s]. But at its heart [i]s the idea of exorbitance or gross excessiveness."

[39] Similar issues arise as regards extent-based constraints in contract: see *Victoria Laundry (Windsor) Ltd. v Newman Industries Ltd.* [1949] 2 K.B. 528 (C.A.) (drawing a distinction between "ordinary" (non-remote) and "exceptional" (remote) lost profits). It has been argued that the distinction between *kind* and *extent* of damage in this context is "open to … criticism": E. Peel, *Treitel on the Law of Contract*, 16th ed. (London 2025), [20-124]. See also M. Bridge (ed.), *Benjamin's Sale of Goods*, 12th ed. (London 2024), [16-045], fn. 366.

[40] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [47(iii)], emphasis added.

[41] Ibid., at [52].

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to the counterparty's loss. It is impossible to say, without contradiction, that (a) the recoverability of damages in tort in respect of contractual liabilities depends on whether those liabilities are so extensive as to render them too remote to be compensable (as the Supreme Court held in *Armstead*); and (b) the fact that the damage suffered is unusually extensive is irrelevant to the remoteness enquiry (as per *Hughes*). The two statements are simply inconsistent with each other.

Of course, we are sympathetic to the notion, which clearly resonated with the Supreme Court, that contracting parties cannot be permitted to determine by their agreement that a third party will bear onerous liabilities in tort. As Lord Leggatt and Lord Burrows pointed out, "in a case of this kind ... there is a danger that this sort of contractual arrangement would be open to abuse and would inappropriately burden the defendant with a liability that does not reflect any actual loss".[42] But the problem remains that the Supreme Court cut across the principle in *Hughes*.[43] The rules in *Armstead* and *Hughes* cannot co-exist. One needs to give way to the other.

Finally, observe that *Armstead* presumably precludes all claims in respect of putative liabilities that arise under clauses that are not reasonable pre-estimates of the counterparty's loss even if the defendant not only foresees that the claimant is party to a contract that contains such a clause but is actually aware of the terms thereof prior to committing the tort concerned. Certainly, *Armstead* does not suggest otherwise. However, when a source of loss is foreseen by the defendant or within the defendant's knowledge, how can the resulting loss be regarded as unforeseeable? In view of the foregoing, it is difficult to resist the conclusion that the Supreme Court has simply declared by fiat that clauses that impose liabilities which are not a reasonable pre-estimate of the loss suffered by the counterparty will be regarded as unforeseeable. There is considerable force in Janet O'Sullivan's remark that "[i]f the real conclusion is, unreasonable contractual charges cannot be claimed in damages, why not say so directly?"[44]

IV. The Procedural Issue

Turning to the burden of proof, as we have observed, the Supreme Court held that the defendant bears the onus of establishing that loss suffered by the claimant is too remote to be compensable. In reaching that conclusion, it proceeded on the basis that the point was free from

[42] Ibid., at [47(iv)]. See also the remarks at [30].

[43] For an example of another tort case in which extent-based constraints were imposed despite the principle in *Hughes*, see *Holbeck Hall Hotel Ltd. and another v Scarborough Borough Council* [2000] Q.B. 836, 861 (C.A.) (Stuart-Smith L.J.): "I do not think justice requires that a defendant should be held liable for damage [due to a landslip] which, albeit of the same type, was vastly more extensive than that which was foreseen or could have been foreseen without extensive further geological investigation".

[44] O'Sullivan, "Negligent Damage", 221.

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authority.[45] But this was not so. In fact, there are a number of cases in which courts in this jurisdiction have held that the claimant in an action in tort carries the burden of proof in relation to remoteness.[46] Leaving this oversight to one side, what is to be made of the arguments that the Supreme Court offered in favour of its conclusion that the defendant carries the onus of proof? Aside from an appeal to "fairness", Lord Leggatt and Lord Burrows offered two main reasons in support of that holding. The first reason was that there is an analogy between the doctrine of remoteness and certain other rules in respect of which the defendant carries the onus of proof that limit the recoverable damages. The second reason was that this allocation was consistent with pleading practice. We will call these twin justifications the analogy argument and pleading argument, respectively. What is to be made of them?

As regards the analogy argument, it is clear that the defendant carries the burden of proof in relation to, for example, the doctrines of mitigation of damage[47] and contributory negligence,[48] and it might also be said, as the Supreme Court did, that these rules have much in common with the law of remoteness at least in so far as they are all damages-limiting rules.[49] In fact, the analogy argument is perhaps rather stronger than the Supreme Court realised because the family of limiting rules in relation to which the defendant bears the burden of proof extends beyond the doctrines of mitigation and contributory negligence. It includes, for example, the rules concerning collateral benefits[50] and illegality.[51] However, the analogy argument is not without difficulty. One problem with it is that there are limiting rules in respect of which *the claimant* carries the onus of proof. Consider, for instance, the so-called *SAAMCO* principle. Lord Leggatt and Lord Burrows identified it as a limiting device. However, and as they properly acknowledged,[52] the burden of proof in relation to it rests with the claimant.[53]

[45] "There is a surprising absence of authority on the question of who has the legal burden of proof in relation to remoteness": *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [62] (Lord Leggatt and Lord Burrows).

[46] Tort cases in which it was held or which contain remarks to the effect that the claimant carries the onus of proof as regards the issue of remoteness include *E. (A Minor) v Dorset County Council* [1995] 2 A.C. 633, 703 (H.L.); *Geofabrics Ltd. v Fiberweb Geosynthetics Ltd.* [2022] EWHC 2363 (Pat), [2023] F.S.R. 8, at [72]. Commonwealth authority to like effect includes *Tame v New South Wales* [2002] HCA 35, (2002) 211 C.L.R. 317, at [88]; *Grace v Orion New Zealand Ltd.* [2021] NZHC 705, at [149]. See also J. Edelman, *McGregor on Damages*, 22nd ed. (London 2024), [53-004] where it is said that "on the issue of remoteness the claimant must allege the items for which they may properly recover: hence the burden of proving them is on them". We have doubts, however, whether most of the cases cited in support of that proposition are actually remoteness cases. See further at [9-002].

[47] See e.g. *Standard Chartered Bank v Pakistan National Shipping Co. and others* [2001] EWCA Civ 55, [2001] 1 All E.R. (Comm) 822, at [33]–[41].

[48] See e.g. *Owners of S.S. Heranger v Owners of S.S. Diamond* [1939] A.C. 94, 104 (H.L.).

[49] Consider e.g. Peter Cane's remark that "[r]emoteness and mitigation are really two sides of the one coin": P. Cane, *Tort Law and Economic Interests* (Oxford 1991), 102.

[50] See e.g. *Burns v Edman* [1970] 2 Q.B. 541, 544 (Q.B.D.).

[51] *Harriton v Stephens* [2004] NSWCA 93, (2004) 59 N.S.W.L.R. 694, at [150].

[52] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [60].

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A second concern relates to the strength of the analogy. The Supreme Court understood the rules regarding remoteness as being closely linked with the doctrines of mitigation of damage, intervening causation, and contributory negligence on the premise that they are all damages-limiting rules. Traditionally, however, the law of remoteness has been regarded as having particular affinity with elements of the cause of action. In particular, as regards the tort of negligence, the functions of the duty of care and remoteness enquiries have long been regarded as intimately connected,[54] and it is of course the claimant who bears the onus of establishing the existence of a duty. Accordingly, it is unclear whether the Supreme Court was correct to regard remoteness as having a greater degree of consanguinity with the damages-limiting rules that it identified. Admittedly, however, the Supreme Court in *Armstead* was concerned with remoteness in its damages-limiting guise, which is a theme to which we return below.[55]

A third difficulty with the analogy argument concerns the Supreme Court's fixation on limiting rules in the law of tort. Oddly, the Supreme Court did not consider the authorities on the allocation of the burden of proof in connection with the doctrine of remoteness in claims for breach of contract, which might be thought to offer the closest analogy. What, then, is the position as concerns the burden of proof of remoteness in the contract context? Authority on the point is clear that the claimant bears the onus. For example, in *Danescroft Jersey Mills Ltd. v Hermann Criegee*, Neill L.J. (with whom Balcombe and Purchas L.J.J. agreed) said:

> [I]t is for the buyer [(i.e. the claimant in a contract claim)] to prove that any loss which he has suffered was caused by the seller's [(i.e. the defendant's)] breach of contract. The burden of proof rests firmly on the buyer [(i.e. the claimant)], not only to prove that the loss was not too remote to be recoverable, but also the quantum of the loss.[56]

Similarly, in *Satef-Huttenes Albertus S.p.A. v Paloma Tercera Shipping Co. S.A. (The Pegase)*, Robert Goff J. observed that "[w]hen a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable".[57] And in *Harrow Green Ltd. v DDG Group Ltd.*, Judge Anthony Thornton Q.C. remarked that "[t]he expenditure claimed must have been the natural, direct and reasonable consequence of the compensated party's dispossession from the land taken and must not be too remote. The burden of proof is on the

[53] *Hughes-Holland v BPE Solicitors and another* [2017] UKSC 21, [2018] A.C. 599, at [53].
[54] See e.g. J.G. Fleming, "Remoteness and Duty: The Control Devices in Liability for Negligence" (1953) 31 Canadian Bar Review 471.
[55] See the text to notes 66–68.
[56] Unreported, C.A., 5 March 1987.
[57] [1981] 1 Lloyd's Rep. 175, 181 (Q.B.D.).

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relocating party".[58] Commonwealth authority points in the same direction.[59] As we have suggested, it might be thought that the allocation of the burden of proof in relation to the issue of remoteness in tort should be the same as in contract.[60] We accept, however, that a possible justification for the difference is that in a contract case the claimant will generally be in as good a position as the defendant to adduce evidence relevant to what was in the parties' contemplation at the time of contracting whereas in a tort case, where the parties are not infrequently strangers, the focus of the remoteness enquiry is on what was reasonably foreseeable from the defendant's perspective.

Turning to the pleading argument, Lord Leggatt and Lord Burrows said that "[i]t is not the practice, when pleading claims for the remedy of damages for the tort of negligence, for claimants to allege that losses were of a reasonably foreseeable type".[61] At least four difficulties afflict this assertion. First, in making it, Lord Leggatt and Lord Burrows did not cite any authority or evidence in support of it. Virtually the only passage of any relevance that we have been able to locate in this jurisdiction is the remark in *Bullen & Leake & Jacob's Precedents of Pleading*, made as regards the law of nuisance, that "[a] defendant should plead specifically a denial that the relevant type of harm was reasonably foreseeable at the relevant time".[62] Secondly, there is limited Commonwealth authority to the effect that the pleading practice is in fact to require claimants to plead that damage is non-remote.[63] Thirdly, although the burden of proof often tracks the burden of pleading as Lord Leggatt and Lord Burrows observed,[64] there are prominent exceptions to this position. For example, insofar as limitation is concerned, the defendant must plead the defence but the claimant must then establish that the claim was brought in time.[65] Fourthly, it might be said that, even if the pleading practice that Lord Leggatt and Lord Burrows considered to obtain in fact exists, it does not follow that the conventions of lawyers

[58] [2010] EWHC 421 (QB), at [11(3)].

[59] "In order to recover damages for breach of contract, a plaintiff must establish two things. First, he must prove on a balance of probabilities that the defendant's breach of contract resulted in the damages claimed. Second, he must establish that the damages are not too remote, that is, that they represent a type of loss which was reasonably foreseeable to the defendant when the contract was made": *Houweling Nurseries Ltd. v Fisons Western Corp.* [1988] 37 B.C.L.R. (2d) 2 (British Columbia C.A.), at [19] (McLachlin J.A.). See also *Cubic Metre Pty Ltd. v C & E Critharis Constructions Pty Ltd.* [2020] NSWSC 479, at [76].

[60] However, it should be noted that at least one case regards *Armstead* as having settled that defendants bear the onus of proof in connection with remoteness in contract: see *AF Kopp Ltd. v HSBC UK Bank Plc* [2024] EWHC 1004 (Ch), at [48] (H.H.J. Hodge K.C.): "Although in terms directed to the legal burden of proof in relation to remoteness of damage in the tort of negligence, I can discern no reason why the guidance provided by the Supreme Court [in *Armstead*] should not also apply to remoteness of damage for breach of contract."

[61] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [64].

[62] W. Blair, D. Brennan, R. Jacob and B. Langstaff (eds.), *Bullen & Leake & Jacob's Precedents of Pleading*, 19th ed. (London 2020), [47-12].

[63] *Golden v Howard* [2023] NSWSC 1418, at [51]–[54].

[64] *Armstead v Royal & Sun Alliance Insurance* [2024] UKSC 6, at [64].

[65] *Cartledge and others v E. Jopling & Sons Ltd.* [1963] A.C. 758, 784 (H.L.).

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ought to be dispositive of what the law is. In view of the foregoing, the pleading argument is weak.

In addition to these difficulties with the analogy argument and pleading argument, one concern that we have with the way in which *Armstead* allocates the burden of proof lies in the fact that, in relation to torts (such as the tort of negligence) that require proof of damage, the law of remoteness serves a dual function. It can limit liability for the damage caused. But it can also preclude liability from arising in the first place since, unless the claimant has suffered non-remote damage, there is no tort at all.[66] *Armstead* was a case that was concerned not with whether a tort had been committed but with the extent of the recoverable loss. It makes it clear that, when the doctrine of remoteness operates in its first-mentioned guise, the defendant bears the burden of proof in respect of it. However, what is the position as regards the onus of proof where the law of remoteness is invoked in connection with liability, which is an issue about which *Armstead*, strictly speaking, says nothing? In principle, since the claimant bears the onus of proving the elements of a tort for which they sue[67] it should fall to them to establish the existence of non-remote damage where damage is the gist of the tort in issue.[68] Therefore, a seemingly irregular (and, indeed, perhaps bizarre) consequence of the decision in *Armstead* is that the burden of proof in relation to the issue of remoteness in a claim in tort can now be borne by *both* parties. In accordance with the principle that the claimant must prove the elements of the tort that they allege the defendant committed, the claimant must demonstrate the existence of non-remote damage where damage is an ingredient of the tort which they contend was committed against them, but pursuant to *Armstead* the defendant must establish that any given head of damages is too remote to be compensable. Whatever else might be said about it, this state of affairs is at least untidy.

V. Conclusion

Armstead further attenuates, in two ways, an already relatively weak control on liability in tort. First, it establishes that contractual liabilities incurred as a consequence of tortiously caused property damage will be non-remote and hence compensable, unless those contractual liabilities are not a reasonable

[66] See e.g. *Overseas Tankship (UK) Ltd. v Morts Dock & Engineering Co. Ltd. (The Wagon Mound)* [1961] A.C. 388, 425–26 (P.C.).

[67] See e.g. A. Tettenborn (ed.), *Clerk & Lindsell on Torts*, 24th ed. (London 2023), [3-01]: "When claimants fail to establish the elements of the particular tort of which they complain, their action necessarily fails".

[68] This is consistent with Commonwealth authority. For example, in *Mustapha v Culligan of Canada Ltd.* [2008] SCC 27, [2008] 2 S.C.R. 114, at [3], [18], McLachlin C.J. said: "As I will explain, [the claimant's] claim fails because he has failed to establish that his damage was caused in law by the defendant's negligence. … [The claimant] having failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury, it follows that his claim must fail". Consider also *Tame v New South Wales* [2002] HCA 35, at [88].

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pre-estimate of the counterparty's loss (or some other limiting rule applies). Secondly, it places the burden of proof of remoteness in tort on defendants (at least in so far as remoteness functions as a damages-restricting rule rather than a liability-defeating rule). The merits of both of these rules are debatable. In particular, and for the reasons that we have given, the first cuts across the principle that the extent of the claimant's loss is irrelevant while the second means that the burden of proof in relation to remoteness in tort is different from that in contract.

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